(3)

No. 417

IN THE

Supreme Court of the United States

OCTOBER TERM, 1942.

WILLIAM W. BACHMANN,

Petitioner,

vs.

NEW YORK CITY TUNNEL AUTHORITY,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO REVIEW JUDGMENT OF COURT OF APPEALS OF THE STATE OF NEW YORK.

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PETITION FOR WRIT OF CERTIORARI TO REVIEW JUDGMENT OF COURT OF APPEALS OF THE STATE OF NEW YORK.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States of America:

Summary and Short Statement of Matter Involved.

The petitioner is the owner of improved real estate in the Borough of Manhattan, City of New York. That real estate suffered change of grade damages as a result of certain grading work lawfully performed by respondent under the statute by which the respondent was created. Under that statute the respondent can be sued and under

it this action was originally brought for damages. In that statute there is no specific provision that the respondent shall be liable for change of grade damages. But the petitioner claims rights to recovery by reason of another statute, the New York City Change of Grade statute. The New York appellate courts, including the highest court of the state, have interpreted that other statute to afford a remedy only where the City of New York, or an agency appointed by it, has done the work, not where the State, or an agency of the State, has performed. The petitioner contends that this interpretation of the statute is not correct, is opposed to other New York State judicial pronouncements, which, in at least one case (West 158th Street Garage v. The State, 168 Misc. 822, reversed on other grounds, 262 App. Div. 67), with a reasoned and emphatic opinion, have decided the other way, and is arbitrary and narrow. That the rights of the petitioner are saved to him by the contracts impairment clause of the Federal Constitution. The Court of Appeals of the State of New York, in deciding the constitutional point raised herein, ruled that "no substantial constitutional question is involved" (Record, p. 28, fol. 83).

Statutes.

This petition is authorized by Section 237 (b) of the United States Judicial Code as amended by the Acts of February 13, 1925 (43 Stat. 937) and January 31, 1928 (45 Stat. 54) and April 26, 1926 (45 Stat. 466).

Date of Final Order and of Application for Appeal.

The Court of Appeals order of dismissal on the ground "no substantial constitutional question is involved" is dated June 18, 1942. The Supreme Court of the State of

New York, on remittitur filed in that court, made an order thereon dated June 25, 1942, which was filed June 26, 1942, in the office of the Clerk of the County of New York. Judgment including costs was entered upon said order July 3, 1942, in the same county clerk's office (Record, p. 32). This petition is dated September 4, 1942.

Statement of Jurisdiction.

This petition questions the validity of Chapter 870 of the New York State Laws of 1939 (Public Authorities Law) (Consolidated Laws, Chap. 43-A), Section 629, found also in McKinney's Consolidated Laws of New York Annotated, Book 42, page 168, et seq., as said statute is interpreted by the highest court of the State of New York, under the Contract Impairment Clause, Article I, Section 10 of the Federal Constitution. The statute, found at pages 2345-2355 of the official New York Reports for 1939, provides:

"Sec. 629—Powers of the Authority—

1. To sue and be sued * * *.

10. In its discretion (a) to pay to the City not exceeding thirty-five percentum of the cost (including awards for damages and expenses) of the acquisition of real property for the widening of existing connections and for new connections, and (b) with the consent of the City to grade, surface and otherwise improve any such connections or to pay to the City the whole or any part of the cost of such grading, surfacing or improving. The City shall maintain such connections as provided by law * * *".

Pursuant to the provisions of the above statute, the street in front of petitioner's improved real property in

the Borough of Manhattan, City of New York, was graded to a new lawful grade by the respondent, inflicting considerable damages to the abutter. He brought an action at law for damages against respondent, as an alternative to a proceeding, then pending at his instance, against the Board of Assessors of the City of New York, to be explained shortly, under said Section 629, subd. 1. Other than by said Section 629, subd. 1, the Tunnel Authority Act makes no provision for the paymnet of damages by it, inflicted as a result of change of grade work in front of an abutter's premises. But the petitioner relied also upon another State statute, known as the New York City Change of Grade Statute, Laws of New York, 1901, Chapter 466, as amended by Laws of 1920, Chapter 786, etc., and its essential reincorporation into the present New York City Administrative Code, to be quoted more particularly hereafter.

It is the position of the petitioner that the said New York City change of grade statute, in existence in its present form substantially since 1816 (Ash, Annotated Greater N. Y. Charter, 5th Edition, 1925, Section 951, note) affords to abutters a remedy for change of grade, regardless who does the work of grading, whether the City, the State, or a specially created agency of the State, as here, the New York City Tunnel Authority. So that, to make the respondent liable in the case at bar, the existing Public Authority Act is adequate as it stands.

It is the position of the petitioner that the present change of grade statute for New York City, found in the New York City Administrative Code, but before that in Greater New York Charter, Section 951 thereof, which was effective when petitioner acquired the aforesaid real property in 1935, is available to abutters not only when the City does the work, but whoever does it. That in enacting the change of grade statute to provide a remedy that the common law does not give, the State legislated not so much for the purpose of meeting an impending crisis in a certain neighborhood of the city, but to provide a general policy as to

change of grade, under which building in the young and growing city might be encouraged. That in enacting the statute and pursuing that policy, the State thereby surrendered its sovereign irresponsibility over the subject matter within the particular instrumental subdivision of it, and thereafter had no other or different will regarding an abutter's rights, when the State did the work of grading. And furthermore, and finally, the promises of remedy to abutters found in the change of grade statutes, when acted upon actually and consciously, as a matter of fact, in the purchase or improvement of real property, or presumptively, and as a matter of law, give rise to contract rights between the State and the abutter, of which the State is the obligor. And subsequent legislation, like the New York City Tunnel Authority Act, supra, if interpreted by the Courts as not carrying with it suability for change of grade damages, must be deemed to be legislation impairing the obligation of contracts, and repugnant, therefore, to the provisions of Article I, Section 10 of the Federal Constitution.

The common law gives no damages to abutters as a result of injuries inflicted by change of grade. Corpus Juris Secundum, Vol. 29, pages 937 to 944, inclusive.

The change of grade statute in force at the time petitioner acquired his property by purchase in 1935 is to be found in Laws of the State of New York for the year 1901, Chapter 466, Section 951 (as amended by Laws of 1920, Ch. 786, L. 1918, Ch. 619; L. 1916, Ch. 516; L. 1915, Ch. 537). See Ash, Annotated Greater New York Charter, 5th Edition, year 1925, notes to Section 951.

The pertinent part of said Section 951 reads as follows:

> "An abutting owner who has built upon or otherwise improved his property in conformity with the grade of any street or avenue established by lawful authority, and such grade is changed after such buildings or improvements have been erected, and the lessee

thereof, shall be entitled to damages for such change of grade. An owner who has built upon or otherwise improved his property prior to the original establishment of a grade by lawful authority, and the lessee thereof, shall be entitled to damages caused by the grading of the street in accordance with such established grade * * *. Except as herein provided, there shall be no liability for originally establishing a grade or for changing an established grade. Damages to such buildings and improvements shall be ascertained and assessed by the Board of Assessors in the manner hereinafter provided * * *."

The rest is procedural.

The change of grade statute in force at the time of the aforesaid grading in front of petitioner's premises is found in Laws of the State of New York of 1937, Chapter 929 (also Chapter 928), known as the Administrative Code of the City of New York, Sec. 307-a-3.0. The pertinent part reads as follows:

"Sec. 307a-3.0. Award of damages to land and improvements by reason of grading of streets; measure of damages; presentation of claims. * * *

a. There shall be no liability for originally establishing a grade or for changing an established grade, except as provided in this section.

1. Where an owner has built upon or otherwise improved his property prior to the original establishment of a grade by lawful authority, such owner and the lessee thereof shall be entitled to damages only to such buildings and improvements for the grading of the street in accordance with such established grade.

2. When an owner has built upon or otherwise improved his property in conformity with the grade of

any street or avenue, established by lawful authority and such grade is changed after such building or improvements have been erected, such owner and the lessee thereof, shall be entitled to damages only to such buildings and improvements for the change of grade."

The abutter here, while pursuing his rights against the Board of Assessors of the City of New York under the foregoing section of the Administrative Code, took the precaution of bringing this instant action against New York City Tunnel Authority. The defendant authority, represented by the Corporation Counsel of the City of New York, moved to dismiss the complaint on the ground that it failed to state a cause of action, pursuant to Rule 106 of the Rules of Civil Practice of the State of New York. The Special Term of the State Supreme Court that heard the motion to dismiss reserved decision pending determination of an appeal of a similar case, involving not the same but another public authority act of the State of New York, in the Appellate Division of the Supreme Court, First Department (Matter of Minnie Young v. Frederick J. H. Kracke, et al., 262 App. Div. 67) (Exhibit A), and then upon the coming down of the decision in the Young case, reversing the Special Term which had sustained the sufficiency of a similar complaint, dismissed the appellant's complaint on the authority of the Young case, supra, with an opinion (Shientag, J., 105 N. Y. Law Journal, p. 2549, June 6th, 1941; Record, p. 15, Exhibit B).

The Minnie Young case was argued in the Appellate Division about two weeks before an appeal was argued there on behalf of the petitioner, in another action against the President of the Borough of Manhattan, City of New York, that he be compelled to issue a certificate of completion of the grading work herein as the preliminary to the reception of a claim for damages on behalf of petitioner by the Board of Assessors of the City of New York.

On this appeal, which sought to reverse a decision of another Special Term, which had dismissed a petition for an order in the nature of mandamus as insufficient in law, it was argued that the abutter had his remedy against the Board of Assessors of the City of New York and against the Tunnel Authority, but that the claim against the Board of Assessors better suited the convenience of the abutter, who had his choice of remedies. These appeals were argued in March, 1941, and the decision in the Minnie Young case came down the end of May, 1941. The appeal of Bachmann v. Isaacs, President of the Borough of Manhattan, had resulted in an affirmance of the order of the Special Term, dismissing the petition without further opinion (Bachmann v. Isaacs, etc., 261 App. Div. 1054).

It is not surprising, therefore, that the opinion in the Minnie Young case, supra, is a two-edged sword. It declares that under existing law the abutter is remediless as well against the Board of Assessors of the City of New York as against the Public Authority, and reversed the order of the Special Term. That court had ruled in favor of the abutter against the Board of Assessors without an opinion, in spite of three recent previous *nisi prius* decisions which had ruled the other way and which were pressed upon its attention by the Corporation Counsel.

The judgment in the Minnie Young case was appealed to the Court of Appeals of the State of New York, which affirmed the judgment of the Appellate Division without further opinion (287 N. Y. 634).

In that appeal, the writer, with permission, filed a brief as amicus curiae on behalf of Minnie Young, wherein, among others, he raised the point of the contracts impairment clause of the Federal Constitution.

In the appeal herein to the Appellate Division from the order of dismissal of the Special Term, the petitioner raised in his brief only the single point of the impairment of contracts clause of the Federal Constitution, which had been raised before the Special Term, among other points.

The Appellate Division affirmed the Special Term without further opinion (263 App. Div. 945).

On appeal herein to the Court of Appeals of the State of New York, the petitioner again raised in his brief only the contracts clause impairment point (Record, p. 20). The highest State Court, in a unanimous decision, on motion by the Corporation Counsel of the City of New York, dismissed the appeal, with costs, on the ground that no substantial constitutional question is involved (Record, p. 28, fol. 83) (Order of Dismissal, June 18, 1942, 288 N. Y. 231).

Yet in the brief to the Court of Appeals herein, it was pointed out that the change of grade statute for New York City nowhere says, nor has it ever said, in so many words, that only where the city does the work is there any liability. That it could have so spoken, but does not. That the abutter, where a change of grade statute exists, properly can be deemed to have relied upon its promises of remedy when he purchases or improves. That as a result of such change of grade legislation and such reliance thereon, a contract arises between the State and the abutter, of which the State is the obligor, analogously to the reasoning in New York elevated railroad cases.

In the New York elevated railroad cases, the abutter was deemed to have relied, as a matter of law, on the promises of the condemnation statute of 1813 (Story v. N. Y. El. RR. Co., 90 N. Y. 122; Kane v. N. Y. El. RR. Co., 125 N. Y. 164; Muhlker v. N. Y. & Harlem RR. Co., 197 U. S. 544). That statute was construed by the New York Court of Appeals as promising to abutters that the city streets in the City of New York should be used forever in a certain public way, that resulted in the possibility of a contract between the State and the abutter since 1813; and that the subsequent elevated railroad legislation, which permitted elevated railroad structures to be planted in the public streets without making provision for the compensation of abutters who might be damaged thereby, was inconsistent with the aforesaid promised manner of utilizing

the public streets and was therefore legislation impairing a contract.'

The record of the proceeding herein is with the Supreme Court of the State of New York, County of New York.

The question sought to be reviewed herein and raised below has not been foreclosed by prior decisions of the Supreme Court of the United States.

The following decisions are believed to sustain the jurisdiction of this Court:

People of the State of Indiana ex rel. Anderson v. Brand, 303 U. S. 95, 82 L. E. 685, 58 S. Ct. 443, 113 A. L. R. 1482;
Wood v. Lovett, 313 U. S. 362, 85 L. E. 1404;
Coombes v. Getz, 285 U. S. 434, 52 S. Ct. 435, 76 L. E. 866;
Muhlker v. N. Y. & H. RR. Co., 197 U. S. 544, 49 L. E. 872;
Tidal Oil Co. v. Flanagan, 263 U. S. 444, 68 L. E. 382;
Kane v. N. Y. El. RR. Co., 125 N. Y. 164;
Story v. N. Y. El. RR. Co., 90 N. Y. 122.

A clearly substantial Federal question not heretofore passed upon by the Supreme Court of the United States is here presented for determination:

1. Where a State change of grade statute is enacted to supply a remedy not given at common law, in an instrumental subdivision of it, and is silent on the matter of State liability, where the State might do the very work of grading by reason of its ultimate ownership of the fee of the streets, and where in said legislation a reservation of non-liability of the State could have been provided, had such been the legislative intent, can the statute nevertheless be construed to mean without liability of the State when the State in fact does the work of grading?

2. Under a remedial change of grade statute, does not the abutter who acts in reliance thereon, either presumptively, as a matter of law, or actually and consciously, as a matter of fact, acquire contract rights as against the State or any of its instrumentalities, that is protected against impairment by subsequent legislation, under Article I, Section 10 of the Federal Constitution?

While the petitioner might have urged with equal assurance the applicability also of the Fourteenth Amendment, Section 1 thereof, in that after grading work is performed, vested rights accrue to the abutter, as laid down in the case of Ettor v. City of Tacoma, 228 U. S. 148, 33 S. Ct. 428, 57 L. Ed. 772, with the commentary thereon in Coombes v. Getz, 285 U. S. 434, by the late Mr. Justice Sutherland, which indeed was the other constitutional point urged herein in the brief at *nisi prius*, nevertheless, from the standpoint of facile legal logic, the contracts impairment clause is the more attractive position. It has seemed to the writer, perhaps without justification, but nevertheless he has felt it, that the statement of a Court that vested rights accrue at a certain time, carries more of judicial fiat with it than anything in the contracts clause argument. Under the contracts clause, moreover, it becomes the *duty* of this Court to decide for itself whether a contract exists that has been impaired, and so to examine the State statutes and decisions with a view to making an independent appraisal of same.

The question raised on this petition is one of interest to abutters throughout the nation. The Ettor case, supra, where the legislature of the State of Washington repealed a substantial portion of a change of grade statute while an action for such damages by an abutter was pending, is symptomatic of a tendency of officialdom to seek to restrict the rights of abutters for the purpose of effecting belated "economies" in the aftermath of prodigal public works.

It is respectfully submitted that a substantial Federal question is here presented for determination.

Assignment of Error.

The Court of Appeals of the State of New York erred in dismissing the appeal to the State's highest Court, on the ground that no substantial constitutional question is involved.

WHEREFORE, your petitioner respectfully requests that this Court issue a writ of certiorari to the Supreme Court of the State of New York, to certify and send to this Court a full and complete transcript of the record herein, to the end that the cause may be reviewed and determined by this Court, as provided by law, that the judgment may be reversed with costs, and for such other and further relief as may be appropriate and granted in the premises.

Dated, New York, September 4, 1942.

Respectfully submitted,

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EXHIBIT A.

Opinion of Appellate Division, First Department, in the Minnie Young Case, 262 App. Div., Page 67.

In the Matter

of

The Application of MINNIE YOUNG,

Petitioner-Respondent,

For an Order Directing FREDERICK J. H. KRACKE, and Others, Constituting the Board of Assessors of the City of New York,

Respondents-Appellants,

To Advertise for Claims and to Assess the Damages Caused to Petitioner's Buildings and Improvements by Reason of the Change of Grade Caused by the Grading of Beach 73rd Street Between Beach Channel Drive and the Public Beach in Front of and Abutting the Premises of the Petitioner Herein, Pursuant to the Provisions of Section 307a-3.0 of the New York Administrative Code.

First Departmnet, May 29, 1941.

Appeal by the Respondents from an order of the Supreme Court (STEUER, J.), entered in the office of the Clerk of the county of New York on the 23rd day of October, 1940.

Alfred D. Jahr of counsel (Julius Isaacs with him on the brief; William C. Chanler, Corporation Counsel), for the Appellants.

Bernard L. Bermant of counsel (George Bergen with him on the brief; Skinner & Bermant, Attorneys), for the Respondent.

COHN, J. The question presented by this appeal is whether the city of New York is liable in damages to an abutting property owner where a State Authority, under an act of the Legislature, enters upon a city street and, pursuant to an agreement between the city and the authority, changes the grade of such street at the Authority's own cost and expense.

It is alleged in the petition, the sufficiency of which has been attacked by defendants, that petitioner is the owner of certain improved property situated on the west side of Beach Seventy-third street, Rockaway Beach, borough of Queens; that Petitioner's buildings were erected in 1908 on the duly established grade then in existence; that on April 28, 1938, the board of estimate of the city of New York adopted a resolution approving a map changing the lines and grades of Beach Seventy-third street and adjoining streets; that prior to April 28, 1938, the city entered into an agreement with the New York City Parkway Authority, a quasi-public corporation organized under chapter 90 of the Laws of 1938, whereby it was agreed that if the city would acquire title to certain lands necessary for the construction and extension of Cross Bay Parkway and connecting parks and parkways, the parkway authority would do all the physical work in connection with the paving, grading and improving of the several parks and parkways, including Beach Seventy-third Street, and would construct them as delineated on the aforesaid map adopted by the board of estimate on April 28, 1938; that thereafter the parkway authority completed the work on October 7, 1939; that neither the board of estimate nor the city ever accepted the work of changing the grade of the street in front of petitioner's premises.

The petition also alleges that as a result of the improvement the grade of Beach Seventy-third street was raised at least two feet; that the board of assessors failed to advertise for the filing of claims in accordance with the provisions of section 307a-3.0 of the New York City Administrative Code and that the claim filed by the petitioner

on July 17, 1939, was rejected. The petitioner prays for an order requiring the board of assessors to advertise for claims and to assess petitioner's damages resulting from the change of grade.

An owner of real property has no constitutional right to recover damages for change of grade and is only entitled to such damages as have been expressly authorized by the Legislature. (People ex rel. Architects' Offices Co. Inc. v. Ormond, 201 App. Div. 787; affd. 234 N. Y. 549; Sauer v. City of New York, 180 id. 27; affd. 206 U. S. 536; Licht v. State of New York, 277 N. Y. 216, 220; West 158th Street Garage Corp. v. Fullen, 139 Misc. 245, 249.) The law which the petitioner invokes in this case is section 307a-3.0 of the New York City Administrative Code. This statute provides that when a street shall have been regulated and graded and a certificate of completion and acceptance "by the appropriate city agency in charge of the work of such grading shall have been received by the board of assessors," the board is required to publish in the City Record a notice to persons to file claims. (N. Y. City Administrative Code, section 307a-3.0, subd. b.) The statute further provides: "No award shall be made unless a claim in writing shall have been filed with the board of assessors within ninety days after the grading shall have been completed and accepted *by the appropriate city agency in charge of the work.*" (Emphasis ours.) Here the petition shows that the grading was done not by a city agency but by the parkway authority and that the work was never accepted by the city. No certificate of completion, therefore, could be transmitted to give the board of assessors jurisdiction to advertise for claims or to make awards for change of grade damages.

By provision of the statute upon which petitioner bases her claim it is clear that the Legislature has limited the authorization for such claims only to those instances where the work is done by an agency of the city. The New York City Parkway Authority is not a city agency within the purview of section 307a-3.0 of the Administrative Code.

It was created by an act of the Legislature (Laws of 1938, chap. 90). This act was later repealed and reincorporated in the Public Authorities Law (Laws of 1939, chap. 870, sections 275-296) (Consol. Laws, chap. 43-A). The Authority is described as a public benefit corporation. (Section 277, subd. 1.) It has power to sue and be sued (sections 279, subd. (a), 293); to charge tolls and collect revenues for the use of parkways or parts thereof (section 279, subd. (i)); to make contracts; to acquire property for its corporate purpose (section 279, subds. (c) and (d)) and to construct the parkways. The Authority is, obviously, an independent corporation created by the State and is specifically endowed with the powers heretofore mentioned. The Legislature contemplated that the cost of the improvement is to be borne by the parkway authority, which is to repay itself out of the tolls, and upon complete reimbursement the improvement is to pass to the city. Any damage for change of grade manifestly should be part of the cost of the project. The city, however, is not liable on contracts of the parkway authority. Since the petition states that the New York City Parkway Authority constructed the improvement, the board of assessors in such case lacks the power to advertise for claims or to assess damages for change of grade.

Reliance is placed by petitioner upon People ex rel. Cladel v. Seaman (168 App. Div. 67; affd. 216 N. Y. 649). In that case this court held that where the city of New York changes the grade of the street and pays the cost of the work out of a special fund, it cannot deprive the abutting owners of the right to recover damage for a change of grade. Concededly, in the case at bar, if the city had changed the grade of Beach Seventy-third street, the city would be liable. This work, however, was not done by the city.

The statute which created the New York City Parkway Authority does not specifically make this body liable for damages for change of grade. With respect to the Port

of New York Authority created pursuant to an interstate compact, a specific statute was enacted by the New York Legislature which authorized and empowered the Port of New York Authority to make payments for damages resulting from a change of grade of streets (Laws of 1935, chap. 876). If no other remedy is available, it would seem that petitioner might obtain the necessary relief from the Legislature.

The order appealed from should be reversed, with twenty dollars costs and disbursements, and the motion to dismiss the petition for insufficiency should be granted.

O'Malley, Townley, Glennon and Untermyer, JJ., concur.

Order unanimously reversed, with twenty dollars costs and disbursements, and the motion granted.

Exhibit B.

Bachmann v. N. Y. City Tunnel Authority—This is a motion by defendant to dismiss the complaint as insufficient in law under Rule 106. The facts set forth in the four alleged causes are substantially the same, therefore, I shall discuss the Bachmann case, which is typical of the others.

The complaint alleges that the plaintiff is the owner of certain improved property fronting on Thirty-seventh street, a public street in the Borough of Manhattan; that the defendant is a public benefit corporation organized under the laws of this state; that during the spring and summer of 1940 the street was graded to a new grade below its previous existing legal grade, which change of grade was authorized by the Board of Estimate of the City of New York. As a result of the grading the complaint alleges that the plaintiff's premises suffered a change of grade damage due to depreciation in fee, as well as in

rental value of the premises. Judgment is demanded against the defendant in a sum of money with interest thereon from the 19th day of May, 1940.

The defendant moves to dismiss the complaint because it fails, on its face, to state facts sufficient to constitute a cause of action.

For the purposes of this motion, the allegations of the complaint are deemed true. The complaint attempts to set up a cause of action for a change of grade damage. Such damages are damnum absque injuria (Radcliff's Executors v. Mayor of B'klyn, 4 N. Y., 195 [1850]; Sauer v. City of N. Y., 180 N. Y., 27 [1904], aff'd 206 U. S., 536). The property owner is entitled only to such damage as has been expressly authorized by the Legislature (103 Park Ave. Co. v. Exchange Buffet Corp'n, 242 N. Y., 366 [1926]). To the same effect is People ex rel. Crane v. Hahlo (228 N. Y., 309, aff'd 258 U. S., 142).

The plaintiff Bachmann recently endeavored to obtain grading damage for the same cause by applying to the Special Term of the Supreme Court, New York County, for an order directed to the President of the Borough of Manhattan requiring him to issue a certificate of completion and acceptance of the grading work done by the New York City Tunnel Authority. The application was denied by Mr. Justice McLaughlin, and the order below was unanimously affirmed by the Appellate Division, First Department (Matter of Bachmann v. Isaacs, 105 N. Y. L. J., 467, January 30, 1941, aff'd 261 App. Div., 1054).

The defendant was created by Laws of 1936, chapter 1. The act is now found in Public Authorities Law, section 627, et seq. Under the act (Public Authorities Law, sec. marked 629, subdiv. 10-b) the Authority was empowered "with the consent of the City, to grade, surface and otherwise improve any such connections or to pay to the City the whole or any part of the cost of such grading, surfacing or improvement." The term "connections" is defined

in section 626, subdivision 10, to mean "all roads, streets, parkways or avenues connecting with the approaches."

The right of the Tunnel Authority the defendant herein, to enter upon and make changes in the city streets was expressly authorized by statute, and as the public streets are held in trust for use of all of the people (Bradley v. Degnon Cont. Co., 224 N. Y., 60, 67, 68 [1918]), the Legislature has control and authority over the streets and can permit such changes therein as it deems proper.

The Tunnel Authority is a public benefit corporation created by the Legislature and is an agency of the State of New York. The change of grade statute contained in the Administrative Code does not apply to work done by the Tunnel Authority (Administrative Code, sec. 307a-1.0, p. 126; Matter of Bachmann v. Isaacs, supra).

This precise question was passed upon on May 29, 1941, by the Appellate Division, First Department, in Matter of Young. In that case, Cohn, J., writing for a unanimous court, said: "The statute which created the New York City Parkway Authority does not specifically make this body liable for damages for change of grade. With respect to the Port of New York Authority created pursuant to an interstate compact, a specific statute was enacted by the New York Legislature which authorized and empowered the Port of New York Authority to make payments for damages resulting from a change of grade of streets (L. 1935, ch. 876). If no other remedy is available, it would seem that petitioner might obtain the necessary relief from the Legislature."

What Cohn, J., wrote concerning the New York City Parkway Authority applies with equal force to the New York City Tunnel Authority, the defendant in this case. Here too it would seem that the relief for the plaintiff must come from the Legislature.

The motion to dismiss the complaint is accordingly granted. The clerk is hereby directed to enter judgment accordingly. Order signed.

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(2943)

FILED
OCT 1 1942

Supreme Court of the United States

No. 417. October Term, 1942.

WILLIAM W. BACHMANN,
Petitioner,

against

NEW YORK CITY TUNNEL AUTHORITY.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI.

September 25, 1942.

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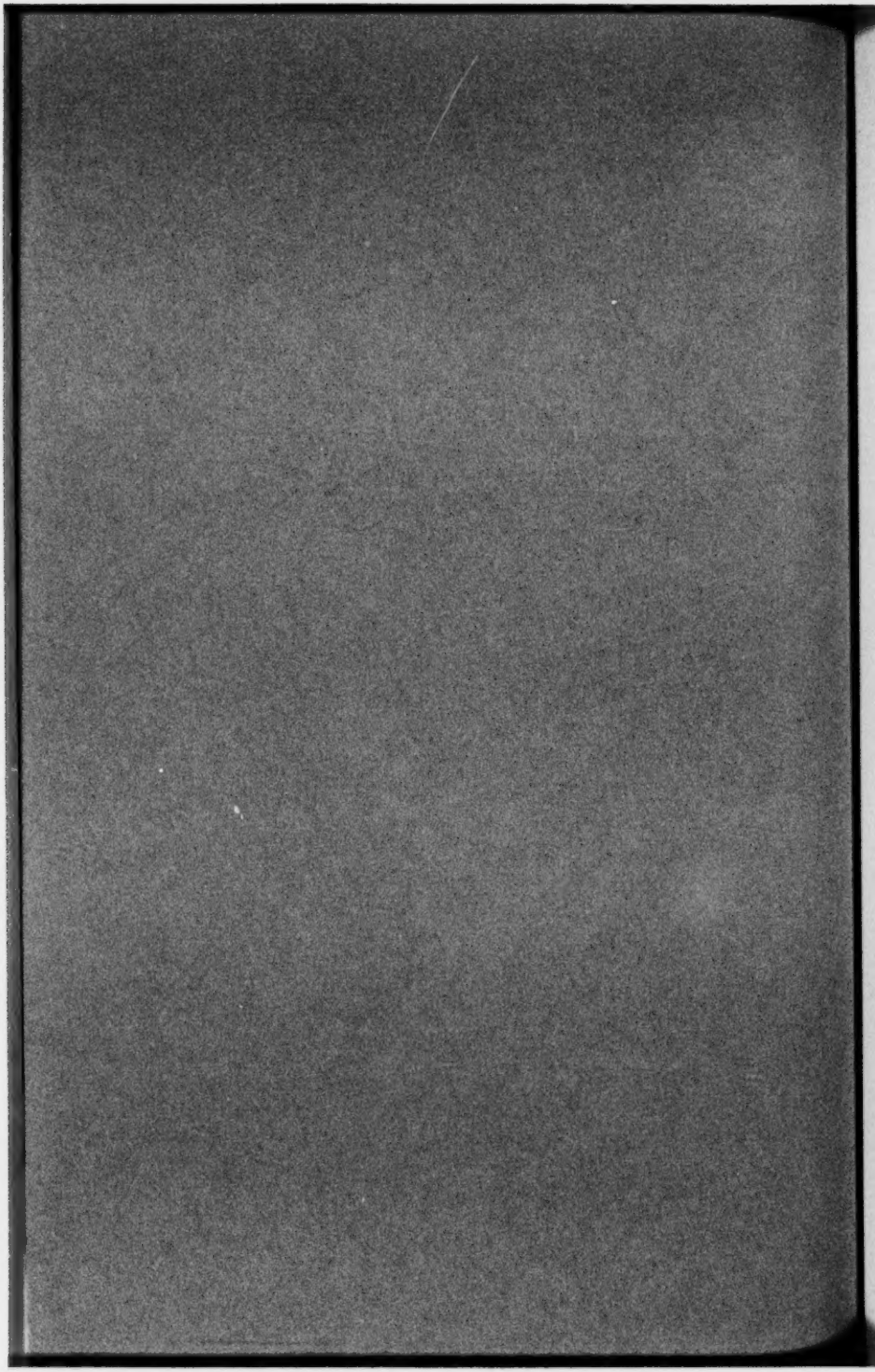

Supreme Court of the United States

No. 417. October Term, 1942.

WILLIAM W. BACHMANN,
Petitioner,

against

NEW YORK CITY TUNNEL AUTHORITY.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI.

The petition for certiorari should be denied because the complaint (R. 8-13), fails to assert a violation of the plaintiff's rights under the United States Constitution.

The petition should be denied for the further reason that while the plaintiff in his complaint seeks damages for change of grade, it is well-established that such a right is not one guaranteed by the United States Constitution. *Smith* v. *Corporation of Washington, D. C.,* 20 How. 135, 148 (1858). And see *Mead* v. *Portland,* 200 U. S. 148, 163-164 (1906); *Sauer* v. *City of New York,* 206 U. S. 536 (1906); *Crane* v. *Hahlo,* 258 U. S. 142 (1922). It is therefore a right which the State may give or withhold in its discretion.

It is true that the last two cases cited concerned a viaduct built down the middle of a street, rather than a change of grade of the roadway itself. But this Court put the two occurrences on a parity, saying in the *Sauer* case (p. 544):

> "The state courts have uniformly held that the erection over a street of an elevated viaduct, intended for

> general public travel and not devoted to the exclusive use of a private transportation corporation, is a legitimate street improvement equivalent to a change of grade; and that, as in the case of a change of grade, an owner of land abutting on the street is not entitled to damages for the impairment of access to his land and the lessening of the circulation of light and air over it."

See also *Osborne* v. *District of Columbia,* 63 App. D. C. 277, 72 Fed. (2d) 70 (1934), where the defendant was held not liable for damages alleged to have been suffered by a change of grade of the character presented in the case at bar.

Cases like *Muhlker* v. *New York & Harlem R. Co.,* 197 U. S. 544 (1905), are distinguishable because they involved a change in state law under circumstances amounting to the impairment of the obligation of a contract. In the instant case, state policy has undergone no change but has been consistent in its denial of relief under the circumstances presented here. Moreover, the plaintiff's invocation of the contracts clause proceeds from a bizarre misreading of the decisions of this Court, and flies in the face of *Garrison* v. *City of New York,* 21 Wall. 196, 203-204 (1874).

No decisions in this Court have been cited by the petitioner, nor discovered by our own researches, which hold that, *in a field where compensation is a statutory and not a constitutional right,* the State cannot impose liability on cities while refraining from imposing liability either on itself, or on public "authorities," which are not political subdivisions *strictiore sensu* but are bodies charged with responsibility for carrying out and maintaining particular public improvements. That is all that has occurred here. Had the Mid-Town Tunnel been a strictly municipal project,

carried out by the City of New York, liability to one situated as was the petitioner would have been imposed by N. Y. L. 1937, ch. 929, § 307a-3.0(b) (Administrative Code of the City of New York, p. 127). But it is otherwise where the entrepreneur is one of the "authorities" organized by the State of New York under the Public Authorities Law (N. Y. Laws 1939, ch. 870).

We call the Court's attention to the fact that in the instant case, the Court of last resort of New York did not entertain the plaintiff's appeal, but dismissed it "on the ground no substantial constitutional question is involved". 288 N. Y. 707, 708 (Advance Sheets of July 25, 1942, temporary pagination 231).

The petition for certiorari should be denied.

September 25, 1942.

Respectfully submitted,

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